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Before the
FEDERAL COMMUNICATIONS Commission
Washington, D.C. 20554

In the Matter of	)	
Preemption of State and Local Zoning and Land Use Restrictions On the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	MM Docket No. 97-182

REPLY COMMENTS OF
THE CITY OF PHILADELPHIA

Summary

The City of Philadelphia (the "City") submits these Reply Comments because the National Association of Broadcasters (the "NAB") and other broadcasting industry representatives have not demonstrated that preemption is necessary to advance federal policy goals. Thus, the Commission should reject the NAB's arguments and abandon its proposed rulemaking to preempt local zoning authority over the siting and construction of digital television ("DTV") facilities.

By responding to the Notice of Proposed Rulemaking's (the "NPRM's") call for a "detailed record" with anecdotes and assumptions instead of verifiable facts, the NAB and other commenters implicitly concede that, as a rule, local governments will not unreasonably delay acting on siting requests. The examples for which the NAB and other broadcasters did supply detailed information are instances in which broadcasters did not obtain exactly what they wanted, but do not establish that local governments behave unreasonably. The industry's evidence has

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succeeded only in showing that cases involving unreasonable behavior by local governments are extremely rare. Therefore, the record before the Commission does not support the Commission's intervention in local affairs on such a massive scale.

It is, in fact, clear from the comments of the NAB and the broadcasters that the rule they propose does not achieve that fair balance of federal interests, local government interests, and industry interests that the NPRM announced as the goal in this proceeding. Their proposal is, on the contrary, carefully designed to favor only the narrow interests of the broadcasting industry, regardless of the impact on our citizens and our neighborhoods. In summary, the proposed rule and the arguments presented by the broadcasting industry should be rejected for the following reasons:

- The NAB claims the proposed preemption is narrowly tailored to focus on regulatory "procedure" rather than substantive authority, and on a few circumscribed areas like radio frequency emissions and interference which it contends are the exclusive prerogative of the Commission. The NAB's claim is disingenuous, if not outright misrepresentation. As established below, the proposed rule will effectively eliminate all local regulatory authority – including code enforcement as well as zoning authority – over all radio and television broadcasting towers and related facilities, including even studio buildings. The proposed rule would result in nothing less than a global preemption of local land use authority.

- State and local regulation intended to address legitimate aesthetic concerns should not be preempted. The "aesthetic issues" belittled by the broadcasters as subjective and irrelevant in fact go directly to the impact of broadcast facilities on the quality of life in our neighborhoods and the value of our citizens' homes and businesses. These are legitimate interests that must be recognized in any "fair balance" of federal, local, and industry concerns.

- Preemption of local deadlines for regulatory action is unnecessary and the proposed time frames are too short to permit the fair and thorough evaluation that is required to protect the legitimate interests of our citizens in ensuring safe structures that do not impact their neighborhoods unreasonably or unnecessarily.

- If the Commission truly seeks to respect local prerogatives over land use, as stated in the NPRM, then it must reject the broadcasters' attempt to use this proceeding to abolish all local regulation of radio and other broadcast facilities, including FM and AM radio

towers and even amateur radio antennas, regardless of whether they are impacted by the Commission's DTV implementation schedule.

- The Commission should reject the broadcasters' attempt to turn it into a national zoning board responsible for arbitrating all siting disputes between local governments and the broadcasters. The Commission lacks the resources and the expertise to provide the alternative dispute resolution and declaratory relief sought by the NAB, and the Telecommunications Act of 1996 makes it clear that Congress intended such disputes to be resolved by the courts, not the FCC.

The Commission lacks the authority to carry out the global preemption of local land use authority that would result from adoption of the proposed rule. The Communications Act contains no express grant of preemptive authority over this area of local law; and based on the record in this proceeding, the broadcasters and the NPRM fail notably to establish a credible basis for implied preemptive authority. In fact, the record in this proceeding demonstrates that the drastic and overbroad preemption sought by the NAB would contribute little to the federal objective of timely DTV implementation even if, contrary to fact, Congress had clearly mandated the unrealistic schedule adopted by the FCC.

For the foregoing reasons, the Commission should decline to preempt local authority over the siting and construction of broadcast transmission facilities and close this proceeding without further action.

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Introduction

The City of Philadelphia (the "City") again urges the Commission not to adopt the proposed rule. The opening comments of the broadcasting industry serve only to demonstrate that Commission action is unnecessary and inappropriate. The industry has utterly failed to provide the detailed record requested in the Notice of Proposed Rulemaking ("NPRM"), demonstrating that there is no evidence of a need for preemption as alleged by the National Association of Broadcasters and the Association for Maximum Service Television (jointly, the "NAB"). Furthermore, the opening comments of the NAB (the "NAB Comments") and other parties demonstrate that the proposed rule does not fairly balance the relevant federal and local interests. It is a one-sided effort to give the broadcasting industry special privileges. Finally, as noted in our opening comments, the Commission does not have the authority to adopt the proposed rule.

I. THE BROADCASTING INDUSTRY HAS NOT RESPONDED TO THE COMMISSION'S CALL FOR A "DETAILED RECORD" THAT WOULD SUPPORT PREEMPTION.

The NPRM recognized that the NAB's original Petition for Further Notice of Proposed Rulemaking (the "NAB Petition") contained only anecdotal evidence of the purported need for preemption. Consequently, the NPRM asked for "a detailed record of the nature and scope of broadcast tower siting issues, including delays and related matters encountered by broadcasters, tower owners and local government officials." NPRM at ¶ 19. Despite this specific request, the NAB and other broadcasting interests have produced little new evidence. Instead, the NAB and other broadcasters have responded with a miscellany of hearsay, unsubstantiated anecdote, and pure speculation about an alleged potential for regulatory delay.[1] Most of the few sworn statements they have provided are vague and speculative, or recite circumstances that have nothing to do with the impact of DTV implementation. Such evidence is insufficient to form the basis of national policy, or to justify the NAB's extreme proposal to override all local zoning authority.

For example:

- ABC, Inc. speculates that "local procedural delays could frustrate ... prompt DTV build-out" and "local substantive rules and decisions could unduly interfere with the federal broadcast scheme"—meaning, presumably, ABC, Inc. - - but offers no evidence that such alleged interference has occurred. ABC Comments at 4. Speculation about problems that may or may not be encountered does not justify federal preemption. Similarly, KOIN Television, Portland, Oregon, states over and over its fear that it "may" be delayed. But the only example of allegedly "unreasonable" regulation it can offer to support its fear is a series of hearings on the siting of PCS, not television, transmission facilities at which KOIN argued, apparently with success, that its proposed tower should not be subject to a pending

[1] Nearly all of the purported evidence in the record is – the NPRM's request notwithstanding – anecdotal and unsupported by declarations based on personal knowledge. While the Commission's rules do not require sworn statements in rulemaking proceedings, we urge the Commission to consider the paucity of reliable information and discount the "factual" claims of the broadcasters as they deserve.

PCS ordinance. Comments of Peter Maroney, VP and General Manager, KOIN Television at 1-2.

- The Association of America's Public Television Stations and the Public Broadcasting Service (collectively, "APTS/PBS") recite four alleged instances of unreasonable regulation (out of 175 public television stations nationwide) but provide no sworn testimony to support any of them. Construction regulations imposed by a Texas community are said to "make building, modifying and operating towers very difficult" without even describing the regulations, let alone justifying their alleged unreasonableness. APTS/PBS Comments at 6-7. A Virginia county is criticized for requiring that new towers permit co-location—an eminently reasonable solution to tower proliferation that is unacceptable simply because it costs the broadcaster a little more money for a stronger tower. Id. at 7-8. Communities in Ohio and Nevada are belabored because local stations allege it "can be difficult to obtain permission to build television towers" on non-government land—no facts or evidence are offered, only a vague complaint that APTS/PBS evidently feels sufficient to justify the imposition of a national zoning regime. Id. at 7.

- The NAB Comments offer only one detailed example of a conflict between a broadcaster and a local government over antenna siting. The NAB claims that a siting application in Raleigh, North Carolina, is being held up because of issues arising out of unrelated litigation between the City and the applicant. Even assuming that this is the only reason for the delay, it is hardly evidence of a problem demanding nationwide preemption. If the Raleigh City Council is acting unreasonably, the applicant has recourse through the courts; if the Council is not being unreasonable, then the NAB's complaint is invalid. This single case does not establish a need for Commission action, or the existence of a national problem requiring the Commission's special expertise.

- The New York Times Broadcasting Service, Inc. ("NYT") would have the Commission abolish local zoning on the grounds that its Huntsville, Alabama operation "appears" to require a zoning variance to modify its tower for DTV, and its attorney has stated "there can be no assurance that the variance will be granted" and "the time within which the Board would act cannot be predicted with certainty." NYT Comments at 4. The attorney's Declaration (one of the few provided by the broadcasters) recites no instances of unreasonable delay in the Huntsville variance process, or any other demonstrable facts that would substantiate his client's apparent anxiety (*see* generally Declaration of Gary C. Huckaby) -- although he testifies that he has "handled requests for other clients for special exceptions and variances ..." *Id.*, p. 2. A lawyer's speculations about problems that may or may not be encountered is not, we suggest, sufficient grounds for abrogating Philadelphia's zoning code.[2]

[2] The NYT submission is, however, particularly instructive because it makes clear that the broadcasters will be satisfied with nothing less than an absolute "assurance" that their zoning applications will be granted within a completely certain period of time. They want guaranteed

- The comments of the North Carolina Association of Broadcasters and the Virginia Association of Broadcasters provide only two examples. The first is the same example cited by the NAB in its comments. In the second, Fauquier County, Virginia, imposed restrictions on the siting of a tower. That request was apparently filed in the fall of 1990 and approved on January 15, 1991. Although some residents expressed concerns related to the health effects of RF emissions, the request was granted subject to conditions that did not restrict the owner's ability to use the tower as a radio transmission facility. It is difficult to see how this example illustrates that local governments will stand in the way of DTV deployment, since the request was granted in a matter of months and the conditions on the grant do not interfere with the intended purpose of the facility. Furthermore, since the case is nearly seven years old, it would seem that such incidents must be extremely rare.

The broadcasters want a federal guarantee of success for their tower applications, at the expense of all local control over land use, in an environment where many other factors control their ability to meet the Commission's deadlines—including not only the Commission itself, but the evident inability of the tower construction industry to provide the required new towers and modifications.[3] *See* Statement of Lynn Claudy attached as Exhibit B to the NAB Petition, ¶ 6; Comments of American Tower Systems, Inc. at 2. As noted elsewhere in these Reply Comments, the proposed rule would eliminate Philadelphia's zoning authority without materially

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success, irrespective of the merits of the application, by guaranteed deadlines, and they seek to make the Commission into a national zoning board in order to achieve that end.

The absurdity of this position is demonstrated by the Comments of Hubbard Broadcasting, Inc. Hubbard complains that it cannot make "firm plans" for DTV buildout, not because it has been subjected to regulatory delay, but "because the Commission is considering numerous petitions for reconsideration of its DTV decisions and the Commission's action on those petitions could result in a different DTV allotment for some or all of Hubbard's stations." Hubbard Comments at 2.

3 Actually, Hubbard has quite a sensible suggestion: The Commission should build into the DTV implementation schedule the time required under existing zoning regulations for notice, hearings, and decisions on tower siting applications. *See* Hubbard Comments at 4. One broadcaster, at least, recognizes that the problem is not local zoning but the Commission's DTV schedule, which fails to take into consideration the many factors that make the Commission's deadlines impossible to meet.

improving the broadcasters' chances of meeting the Commission deadlines. This is hardly a fair balance of alleged federal interests against the cities' interest in land use regulation.

- The few examples of regulatory decisions that appear on their face to be unreasonable (again, sworn supporting testimony is seldom offered) have nothing to do with this proceeding:

  -- Children's Broadcasting Corporation ("Children's") complains of a 1994 rejection of its application to build a new AM radio tower in Riverside County, California—obviously unrelated to the DTV implementation schedule that allegedly motivated the petition for this rulemaking. *See* Comments of Children's Broadcasting Corporation at 2-3.

  -- The New Jersey Broadcasters' Association ("NJBA") cites attempts in the 1980s by two FM radio broadcasters to build or modify transmission towers in residentially zoned areas that allegedly were frustrated by "citizen group pressure." The impact of the Commission's proposed DTV implementation schedule on these two disputes from the past is not explained. And one of the FM stations acknowledges that its more recent attempt to construct a new tower in the same residential area—again unrelated to DTV implementation—has not been rejected. *See* NJBA Comments, Declarations of Marvin Strauzer and Rev. S. Rea Crawford.

  -- The Board of Regents of the University of Wisconsin complains of alleged regulatory "obstacles" to the construction of another FM radio tower—also unrelated to DTV implementation—from which, by the statement of the FM station manager, the university is exempt anyway. And there is no evidence in this proceeding that the particular circumstances described, involving the alleged intransigence of a single local official, can be generalized to the major television markets which, like Philadelphia, have sophisticated and competent zoning officials, as well as public procedures that protect applicants against the arbitrary decisions of individuals. *See generally*, Declaration of Debora M. Russo, Appendix A to Philadelphia Comments. The experience of this Wisconsin FM radio station manifestly does not justify nationwide preemption of local zoning statutes.

- In other cases, it is clear that the broadcasters are pursuing special agendas or airing special grievances that have little, if anything, to do with local zoning regulations and digital television:

  -- WFTC(TV), Minneapolis, Minnesota clearly wants to use this proceeding to advance its own agenda related to a special tower siting problem and resulting dispute among television stations that was not created by local zoning laws, but depends rather on the Commission's Unique Site Rule. WFTC(TV) Comments at 2-7. The only relevance to the rule proposed in

this proceeding is WFTC's admirable belief "that broad preemption rules are not necessary to encourage the prompt deployment of digital television ("DTV") service in its market." *Id.* at 2.

-- The Amateur Radio Relay League (the "ARRL")is even more obviously pursuing a separate agenda, namely the Commission's approval of its own petition for rulemaking and the preemption of regulations for the siting of amateur radio antennas. AARL Comments at 6-7. That is a different proceeding—and surely no one is arguing that the alleged frustrations of amateur radio operators will be affected one way or the other by the Commission's DTV schedule.

-- Goetz Broadcasting Corporation's complaint is that private landowners in Illinois changed their minds about selling land for FM radio towers or asked a price Goetz thought too high. Apparently Goetz would vest the Commission with the power to force private owners to sell their land to broadcasters that want it at prices that suit the broadcasters. Whatever the merits of such a program, it has not, happily, been proposed by the Petitioners, and Goetz's experiences are irrelevant to this proceeding. *See* Comments of Goetz Broadcasting Corporation at 1-3.

-- New Mexico Broadcasting Company's "evidence" of supposedly unreasonable regulatory obstacles consist of (1) alleged delay by the U.S. Forest Service in approving tower modifications on Forest Service land and (2) delay caused by hiring a tower contractor unlicensed in the state where a tower was to be replaced. Comments of New Mexico Broadcasting Company at 2-3. Lee Broadcast Group identifies the federal Bureau of Land Management as the cause of delay at the same New Mexico tower site, and the unwillingness of the State of Hawaii to turn over state-owned land for high towers as an obstacle to its tower construction plans for Honolulu. Comments of Gary Schmedding, President - Broadcast Group, Lee Enterprises, Inc. It is surely obvious that neither state licensing requirements for construction contractors, nor the inaction of federal agencies, nor a state government's disposition of its own land, can justify the abrogation of Philadelphia's zoning authority.

It is clear from this brief review of the broadcasters' comments that no factual record yet exists that can justify the complete preemption of local and state authority to regulate the siting

and safety of twelve hundred foot television towers.[4] The Commission should reject the Petitioners' proposed rule and close this proceeding without further action.

The industry complains of allegedly onerous local regulation without any recognition that local governments have compelling reasons for regulating the location and construction of towers. For example, Susquehanna Radio Corp. complains of a tower ordinance adopted by Cedar Hill, Texas – but completely fails to note that this ordinance was adopted after a broadcast tower collapsed, killing three people. City of Dallas Comments at 5. If anything, the City of Cedar Hill would have been derelict in its duty to protect the public safety if it had ignored the incident, particularly since there are, as Susquehanna noted, many other antennas located in the City. The broadcasters' idea of a "horror story" is one of delay and expense – but a local government's horror story is one of death, personal injury and property damage.

Perhaps knowing that there would be few examples of egregious behavior by local governments, the NAB Comments suggest that broadcasters may not participate in this proceeding because they fear retaliation by local officials. NAB Comments at n. 34. This speculative suggestion is absurd, akin to saying that the NAB knuckled under to Congress with respect to allocation of the DTV spectrum itself because of fear of retaliation by federal officials. The broadcasting industry is known for its ability to withstand political pressure at all levels, and this argument is no more than a gratuitous attack on the integrity of local government officials.

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4 As one broadcaster has the candor to note, any preemptive powers that the Commission may possess are "effective only if the Commission can show that obstacles are currently restricting the realization of the goals underlying the federal law." Comments of Children's Broadcasting Corporation at 10 (*citing New York State Commission of Cable Television v. FCC*, 669 F.2d 58 (1982) and *Capital Cities Cable, Inc. v. Oklahoma Alcoholic Beverages Control Board*, 467 U.S. 691 (1984)). The record the broadcasters have made to date in this proceeding does not demonstrate that local zoning regulations are an obstacle justifying the radical remedy of preemption.

The truth is that there have been very few controversies over the siting of broadcast towers in the past. The NAB is seeking to obtain special treatment -- treatment that is not accorded to any other industry -- by inventing a crisis.

The NPRM also asked whether any difficulties allegedly facing broadcasters are representative of those that may arise in the course of the roll-out of DTV. NPRM at ¶ 20. There is no evidence of a problem in the past, and no reason to believe that there will be a problem in the future.

Instead of conceding this fact, the NAB has attempted to introduce material from unrelated proceedings, including the petition of the Cellular Telecommunications Industry Association (the "CTIA") on personal wireless facility siting moratoria and dockets addressing the siting of satellite antennas. NAB Comments at 20-22. The Commission should not incorporate the record in those proceedings in this docket, because that information is irrelevant and misleading. For example, the NAB's references to the siting of wireless facilities and satellite antennas are irrelevant because they are not direct evidence of a problem pertaining to broadcasting antennas. Wireless facilities and satellite antennas raise public concern because there are often so many of them in a community. In addition, to ensure delivery of service it may be necessary to site such facilities in residential areas and other locations from which such facilities have traditionally been excluded, and satellite dishes must be located on every subscriber's residential rooftop for the service to be furnished at all.

Broadcast towers raise very different issues: they are limited in number and much vastly larger in size (twelve hundred to two thousand feet in height and occupying acres of land, as opposed to a twenty-four inch or less roof-top satellite dish, and PCS towers that are a few feet, or at the extreme, one or two hundred feet in height). And while a television broadcaster may

wish to site an antenna a tower in a residential area for economic reasons, it is unlikely to interfere with delivery of the service if siting is required in an industrial or other more appropriate zone. Thus, reasonable local regulation of the broadcast towers is both critical for our residents, given the greater safety risks and the greater impact on our neighborhoods presented by these immense structures, and less likely to impair significantly the conduct of the broadcaster's business. The City vigorously opposes any preemption of its authority to regulate siting of PCS facilities (and notes that the 1996 Telecommunications Act does not provide for preemption except in the case of decisions based exclusively on RF emissions). The Commission should recognize, however, that the more credible of the arguments against such regulation, because they depend on the operators' need for multiple closely spaced sites and because of the relative simplicity of the installations from a structural and safety point of view, do not fairly apply to radio and television broadcast towers. The two kinds of facility and the two kinds of business are "apples and oranges," and the circumstances of the satellite television and PCS industries do not justify the global preemption of local zoning authority sought by the broadcasting industry in this proceeding.

In addition, the alleged evidence of moratoria on siting of wireless facilities that NAB wishes to introduce into the record is misleading. For example, the NAB's allegation that the CTIA Petition for Declaratory Ruling advised the Commission that 300 communities had adopted siting moratoria is incorrect. The CTIA Petition lists only 110 such moratoria, and the vast majority of those moratoria have long since expired, as they were generally only effective for 90-180 days. *See* CTIA Petition for Declaratory Ruling, Dec. 16, 1996, at n.3 and Attachment. The NAB's reference to 300 communities may have been to a list of communities provided to Chairman Hundt after the CTIA Petition had been filed, which proved inaccurate.

See, e.g., Comments of the City of St. Louis in DA 96-2140, filed Sep. 12, 1997 (stating that St. Louis did not have and never had moratorium on antenna siting) status survey compiled by the National Association of Telecommunications Officers and Advisers, filed Feb. 25, 1997 (noting that most moratoria were of short duration and a number of communities in fact had no moratoria). Thus, the number of communities that adopted moratoria is minuscule in relation to the thousands of local government bodies with zoning authority, and the moratoria that generally are in effect are for relatively short periods. Finally, the NAB has not even attempted to show that local governments have adopted moratoria applicable to broadcast towers.

Without providing the detailed factual information requested in the NPRM, the NAB asks the Commission to make three broad findings: that state and local regulatory requirements are often incompatible with federal requirements; that state and local requirements often overlap with issues regulated comprehensively by the federal government; and that state and local governments routinely impose delays and moratoria on siting of new facilities. NAB Comments at 22. Based on these unsupported findings, the NAB wants the Commission to adopt policy that would have the effect of abrogating local regulatory authority.

The burden is on the NAB and the broadcasting industry to show that there is a problem sufficient to justify the drastic preemption of local authority they seek. They have not met that burden and the Commission should not attempt to base policy on the empty record before it. Preemption is neither desirable nor necessary.

II. THE COMMENTS OF THE NAB AND OTHER BROADCASTERS ILLUSTRATE THAT THE PROPOSED PREEMPTION DOES NOT FAIRLY BALANCE FEDERAL AND LOCAL INTERESTS.

If the comments of the NAB and individual broadcasters make one thing clear, it is that the proposed rule makes no attempt to balance the interests of the various affected parties. Indeed, the only interests the rule would advance are those of the broadcasting industry.

A. The Proposed Preemption Is Much Broader than the NAB Admits.

The NAB and the broadcasters claim their proposed rule would preempt local authority only with respect to a limited number of "substantive" matters, notably siting decisions based on radio frequency emissions, interference, or marking and painting requirements. The rest of the rule's provisions, relating to time frames for decision, burden of demonstration, Commission declaratory rulings, and the like, are merely "procedural," they claim, and therefore should not trouble local governments.

This "substance/procedure" distinction is without a difference, as the Petitioners doubtless intend. The absurdly short deadlines they propose will make it extremely difficult for Philadelphia zoning authorities, whose resources are far more limited than those of the multi-billion dollar broadcasting industry, to complete detailed technical reviews of tower applications and create a sound record in support of a decision. Yet if they do not issue a rejection by the deadline, the application will be "deemed granted." Proposed Rule, Section (a). The effect will be to force zoning officials into making rejections based on an inadequate record in cases where they have legitimate safety and other concerns about the proposal or, as typically happens, the applicant does not timely furnish information necessary for a reasoned decision. The rule requires, however, that a decision to reject an application be supported by "substantial evidence" and a written record (*id.*, Section (c)) and then provides that all disputes be resolved, at the

applicant's discretion, before the Commission (*id.,* Sections (d) and (e), relating, respectively, to alternative dispute resolution and declaratory relief).

The intent, obviously, is to force the cities into litigating every rejection, however reasonable, before the Commission on the basis of a hastily assembled and insufficiently considered record of fact that will shift the advantage to the broadcasters and make a favorable outcome for them likely. Where the so-called "procedures" so obviously stack the deck against one party, it is at best disingenuous to claim, as the broadcasters claim, that the "real" preemption is limited to RF emissions and interference. The effect of the proposed rule will be to override all zoning decisions that are not favorable to the broadcasters, and that amounts to a global preemption of local authority over land use -- hardly the "specific" and "narrowly defined" preemption claimed by the NAB. *See* NAB Comments at 5.[5]

Furthermore, as predicted in our opening Comments, the broadcasters are seizing this opportunity to argue that preemption should apply to the regulation of all buildings associated with a broadcast facility, and not just the towers and antennas themselves. *See, e.g.,* Paxson Comments at 6. It is clear that whatever the industry means by any exception for "health and safety objectives" that may or may not be provided in Section (b)(2)(i) of the proposed rule (*see* discussion above and in our opening Comments at n. 1), building, fire, and electrical code regulation is not included. The broadcasters would turn the Commission into a national board of

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5 Nor can the cities rely on the authority and legislative findings of statutes and regulations already in place, since the proposed rule also provides for preemption of any local rule or regulation that "impairs" the ability to construct or modify towers—i.e. any regulation on which a rejection might be based—unless the city can "demonstrate" its "reasonableness" in relation to some specific health or safety objective and the alleged federal interests in letting broadcasters construct their towers. *Id.*, Section (b)(2)(i) (ii). The effect is to force local governments into litigating every rejection, case by case, on a record that favors the broadcasters, and then to litigate in the same Commission proceedings, again under a burden of proof that favors the

code enforcement, as well as a national zoning board, with exclusive responsibility, it appears, for determining the safety of such structures as studio buildings and the buildings that house sophisticated and potentially dangerous transmission equipment. The result would be a Commission expending scarce resources in areas where it has no expertise, running roughshod over local prerogatives and effectively rewriting local zoning and building codes, for the sole benefit of the broadcasting industry. As argued in detail in our opening Comments (*see* pp. 33-36), such a regime is not just bad public policy; it is in clear violation of the Tenth Amendment.

B. State and Local Regulation Intended to Address Aesthetic Concerns Should Not Be Preempted.

The NAB opposes all consideration of aesthetic issues in the zoning process, and the broadcasters would preempt any decision based on aesthetic concerns. *See, e.g.*, NAB Comments at 14-15; Paxson Comments at 5-6 ("aesthetics should not be used to prohibit modifications in existing facilities"); NJBA Comments at 3-4 (demanding preemption of all zoning practices that do not further a specific safety objective). Such total elimination of aesthetic matters from the zoning process is unnecessary and unjustified in order to achieve the stated goals of the proposed rule with respect to DTV rollout. We believe the true reason is that the broadcasters are unwilling to spend even a few dollars in order to mitigate the impact of their towers on our residential neighborhoods.

Zoning authorities often attempt to resolve controversial siting requests by balancing competing interests: they will grant a siting request, but only subject to the applicant's agreement to comply with various conditions designed to reduce the visual effect of the proposed structure on its surroundings. Such provisions may include set-back, landscaping and screening

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broadcasters, the legitimacy of every statute and regulation justifying the rejection. This is not "narrowly defined" preemption.

requirements, and restrictions on where on a site ancillary facilities such as equipment buildings may be located. Even in the case of a tall antenna, such ground-level requirements may soften the impact the facility has on the community. We suggest that the NAB's categorical opposition to such aesthetic considerations is an attempt to preclude, by national fiat, any requirement that may impose some marginal cost on broadcasters. *See, e.g.,* APTS/PBS Comments at 8 (cost of landscaping cited as unreasonable regulation); KOIN Television Comments at 2 (requirements for site mitigation cited as obstacle to "cost-effective" DTV roll-out); and Paxson Comments at 5-6 (arguing for preemption of aesthetic regulations on existing facilities). Thus, the NAB's goal is to reduce the costs of DTV deployment in any way, regardless of the impact on our neighborhoods. The Commission should reject this attempt at a free lunch: If broadcasters are allowed to avoid those costs they will be passed on to surrounding property owners and the community as a whole in the form of a less attractive environment and lower property values.

The NAB claims that decisions based on aesthetics must be preempted because they are too subjective, and too easily used as pretexts to circumvent federal policy. In fact, however, zoning decisions are not subjective: They are governed by written standards and procedures. When a zoning authority addresses aesthetic issues, it does so within the context of procedures set forth in state and local law, and within an established body of precedent in similar cases. Those procedures and precedents establish the parameters for what kinds of measures are reasonable in a particular zoning district in a given community. Thus, the statement that decisions based on aesthetic concerns are in every case subjective and therefore subject to abuse is simply incorrect.[6]

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6 One Eiffel tower may be "an engineering marvel" and a beautiful sight, to paraphrase the NAB's Comments at 14, but three of them side by side look like an antenna farm to their near neighbors and will negatively impact both the quality of their lives and the values of their

In any event, "federal policy" is not the only consideration in a proceeding that the Commission insists is intended to achieve a fair balance between local and federal interests. *See* NPRM at ¶¶ 14-15. As argued in detail in our opening Comments and the attached Declarations, the issue is not subjective judgment but the market values of our citizens' homes and businesses. *See* Philadelphia Comments at 4-5. Real estate values are driven by the perceptions of potential buyers. *See* Declaration of Bernard W. Camins, Appendix B to Philadelphia Comments, ¶¶ 6-9. Potential buyers, whether rightly or wrongly in the eyes of the broadcasters, perceive television and radio transmission towers as ugly, unsafe, and thoroughly undesirable additions to their neighborhoods. *See* Declaration of Debora Russo, Appendix A to Philadelphia Comments, ¶ 5, 10. Philadelphia residents are entitled to protection from unilateral, profit-driven decisions that may result in the sudden destruction of their property values by the placement of twelve hundred foot towers next door. The City does not seek to preclude television towers in appropriate areas, and has, in fact, a zoning code that facilitates appropriate siting. *See* Philadelphia Comments at 5-6. We insist, however, that a fair balancing of the broadcasters' interests against our residents' interests requires that we retain the authority to impose reasonable restrictions on the locations of these enormous structures. The proposed rule would override all interests but those of the

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property. As set forth at length in the Russo and Camins Declarations in support of our opening Comments, the citizens of Philadelphia—and the marketplace for residential properties here—do not perceive television broadcast towers and antennas as so many "Eiffel Towers," or, indeed, as any kind of "marvelous" additions to our neighborhoods. The NAB attempts to obscure the issue further by referring to certain alleged aesthetic factors that broadcasters must consider under the Commission's present rules, including the presence of high intensity lighting; effects on wilderness areas; presence of endangered species; effects on sites listed in or eligible to be listed in the National Register of Historic Places; effects on Indian religious sites; and various environmental factors. With the possible exception of high intensity lighting, none of these factors addresses the impact of towers on Philadelphia's residential neighborhoods, and they in no way mitigate the unfairness of the proposed rule.

Petitioners and their broadcaster constituents. This is neither fair nor balanced, and should be rejected by the Commission.

C. Preemption of Local Deadlines for Action Is Unnecessary and the Proposed Time Frames Are too Short.

The NAB is so determined to obtain the right to ignore any and all zoning restrictions that it rejects out of hand the Commission's suggested review period of ninety days. NAB Comments at 16. As we demonstrated in our opening comments at pp. 9-12, however, local processes are designed to protect the due process and property rights of all members of the community, not the narrow interests of one sector. They require a reasonable amount of time because they endeavor to be fair to all interests. If the local zoning process is to continue to be fair, the Commission cannot impose any mandatory deadlines for local action, irrespective of the difficulty or complexity of a particular case.

The City objects to any federally imposed arbitrary time limit for its zoning reviews and decisions. The time required legitimately varies depending upon the facts of the case at hand, and, particularly, the quality and completeness of the applicants' submissions. The structures here at issue -- one and two thousand-foot guyed towers carrying a heavy load of antennas and cable -- are technologically complicated and present obvious safety risks if the design and construction are not properly executed. The imposition of an arbitrary time limit, with a "deemed approved" penalty if the deadline is missed, places the City in the unacceptable position of having to act on whatever data the applicant elects to provide, however inadequate and incomplete, then resolve any issues, however legitimate, in litigation before the Commission. Whether the time allowed is forty-five days or ninety days, this is not the "fair balancing" of federal and local interests sought by the Commission.

The City does acknowledge the unfairness of zoning delays that are not based on legitimate health, safety, and land use considerations. As pointed out in our opening Comments, however, Philadelphia's zoning scheme provides for tower siting virtually as a matter of right in the numerous industrially zoned areas of the City. Philadelphia Comments at 5-6. It makes no sense to adopt a uniformly and unreasonably strict federal rule merely because of the occasional case that, for entirely legitimate reasons, may take longer.

Furthermore, allowing a period greater than ninety days will have the benefit of encouraging a local government and an applicant to amicably resolve differences, and the additional benefit of encouraging the applicant to correct deficiencies in its submission and satisfy City zoning officials, instead of running straight to the Commission. Nevertheless, the NAB Comments assume that the only conceivable reason for delay is bad faith or unreasonableness on the part of the local government, as if no broadcaster would ever demand that it be allowed to build a tower in an inappropriate place or provide less than complete engineering data. The NAB's claim that preemption is necessary because local governments *sometimes* take an "extraordinary length of time" (NAB Comments at n.4) proves the point. In the vast majority of cases, local processes do not take an unreasonable period of time. The case in which there is a substantial delay is indeed extraordinary.

For these reasons, we urge the Commission to reject the broadcasters' call for a nationally mandated time frame and rely on local governments to act within a reasonable time period, as they do in handling other siting requests.

D. If the Commission Intends To Respect Local Prerogatives, then It Should Not Extend Preemption to Facilities Other than DTV Facilities.

The NAB asserts that preemption should not be limited to actions and rules affecting only DTV facilities, essentially for reasons of administrative convenience. NAB Comments at 7-8.

In addition, numerous industry commenters, primarily AM and FM broadcasters with no apparent interest in DTV, have argued that non-DTV facilities should be included in any final rule. *See, e.g.,* Childrens' Broadcasting Corp. Comments at 14; South Carolina Broadcasters Association Comments at 3; Paxson Comments at 8; discussion of individual radio stations comments in Section I above. For example, the ARRL, whose members will not, as far as we can determine, be required to relocate their amateur radio antennas as a result of the Commission's DTV rollout schedule, calls for a total preemption of any and all local restrictions on transmission equipment of any kind. ARRL Comments at 6; *see* also Paxson Comments at 8. Such attempts to expand the scope of the proposed rule are inappropriate. Applying the preemption to all broadcasting facilities, regardless of any connection to deployment of DTV, would contradict the NPRM's stated sensitivity to local governments' authority to protect "the legitimate interests of their citizens" and the Commission's recognition that local authority should only be disturbed to the degree necessary to meet federal objectives. The stated federal objective of this proceeding is the accelerated deployment of DTV, and that is all. We questioned whether that is a legitimate objective in our opening comments, and we remain convinced that the Commission's short schedule is unjustified and cannot be achieved for reasons wholly unrelated to local zoning procedures. However, by allowing every AM and FM broadcaster and even noncommercial radio users to claim the benefits of the proposed preemption of our land use authority, even where they are completely unaffected by DTV requirements, the proposed rules go far beyond the federal objectives advanced by the Petitioners and the Commission as the rationale for this proceeding. The Commission should reject this transparent attempt by the broadcasters to prosecute unrelated agendas under the guise of the Commission's goals for DTV.

E. The Commission Should Not Attempt To Serve as a Mediator or Arbitrator of Disputes Between Local Governments and Broadcasters.

The City rejects the NAB's contention that alternative dispute resolution by the Commission would be appropriate or effective in resolving tower siting disputes. Unlike the examples cited in the NAB Comments (access to cable programming, open video systems, public mobile services and equipment standards) this is not an area in which the Commission has any special expertise. The Commission staff is not conversant with zoning issues, or with the local conditions on which zoning decisions must be based, and is ill equipped to investigate or evaluate the fact-intensive bases for these disputes. The point applies equally to the proposed vesting of declaratory authority in the Commission. Commission staff have neither the expertise nor the resources to become arbiters of local zoning disputes. These matters are best handled at the local level.

In addition, alternative dispute resolution is not an appropriate mechanism for handling disputes between private parties and government entities over the exercise of governmental police powers. Comments of Jefferson County, Colorado, at 9. Congress recognized this in the 1996 Act, when it specified that the courts should have jurisdiction over issues related to the siting of wireless facilities. *See* 47 U.S. C. § 336(c)(7). The legislative history of Section 336 demonstrates clearly that Congress intended not to give the wireless industry any preferential treatment in zoning matters.[7] Section 336(c)(7) and its legislative history are the sole congressional pronouncement contained in the Act on the issue of how tower siting disputes between the industry and local governments are to be resolved, and Congress clearly decided that

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7 "It is not the intent of [Section 336(c)(7)] to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decisions." H. R. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996).

immediate recourse to the courts shall be available to the local governments. Nothing in the Act or its legislative history suggests that Congress intended a different regime for television broadcast towers, which are the largest tower structures the cities must cope with and obviously have a far greater impact on our neighborhoods than PCS facilities. The Commission's authority over DTV tower siting can be no greater than it is under Section 336(c)(7), and it is clear that such authority does not include the power to insert ADR proceedings between the cities and the courts.[8]

III. THE COMMISSION LACKS STATUTORY AUTHORITY TO PREEMPT LOCAL ZONING LAWS.

As we argued in our opening comments, the Commission cannot lawfully adopt the proposed rules because it does not have the necessary authority. Philadelphia Comments at 15-21. The ostensible rationale for the proposed rules is the speedy deployment of DTV, so that the Commission can recover and auction analog spectrum. The Communications Act, however, does not grant express authority to preempt local zoning laws for any purpose.

As the Eighth Circuit noted in *Iowa Utilities Board v. Commission,* 120 F.3d 753 (8th Cir. 1997), the Commission does not have plenary authority over all matters affecting communications, even where there might be a federal interest involved. That case turned on the Commission's lack of express authority over intrastate communications services. *Id.* at 798-800. Relying on a substantial line of prior decisions, the court found that where express regulatory authority has not been granted by the Communications Act over intrastate matters, the Commission must defer to local regulation. *Id.* Similarly, although the Commission has broad

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8 We also reject the NAB's contention that the Commission must have a direct right of review to break the "logjam" created by jurisdictional disputes between state and federal courts. The NAB has not presented a single example of such a dispute, much less evidence of a "logjam."

authority over the broadcasting field, its authority is not without limits. *Illinois Citizens Committee for Broadcasting v. Sears Roebuck & Co.*, 35 Commission 2d 237 (1972). Local zoning laws are analogous to the intrastate jurisdiction that the Eight Circuit fenced off from Commission regulation in *Iowa Utilities Board*, and are equally outside the Commission's preemptive authority.

Any authority the Commission may have to adopt the proposed rule must thus be implied authority. But the Commission has implied authority to preempt state or local law only if preemption is necessary to accomplish Congressional objectives. In this instance there is no evidence of any Congressionally-recognized objective that would justify preemption.[9] APTS/PBS and others rely on the Balanced Budget Act of 1997, which amended Section 309 of the Communications Act, as establishing a federal goal of speedy deployment of DTV. According to this argument, Section 309(j)(14)(C) establishes a deadline of September 30, 2002, to auction the reclaimed analog spectrum. Therefore, the broadcasters argue, Congress does have a goal of speedy recovery of spectrum that would justify preemption. But this interpretation misreads Section 309(j)(14)(C) and ignores Section 309(j)(14)(A). Section 309 (j)(14)(C) does not say that all licenses shall be converted to DTV and auctioned by the year 2002 or any other date. It says only that "such" licenses, meaning those that happen to have been recovered by that time pursuant to Sections 309(j)(14)(A) and (B), shall be reassigned and the revenues reported to the Congress. Section 309(j)(14)(A) specifically states that analog television licenses may not be renewed for periods extending beyond December 31, 2006, which means that Congress expects that there will be analog licenses outstanding over four years after the alleged deadline in Section

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9 Furthermore, Section 601(c)(1) of the Telecommunications Act of 1996 (uncodified) states that the Act and the amendments made by the Act "shall not be construed to modify, impair or supersede" state or local law unless expressly provided in the Act.